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IN THE

Supreme Court of the United States

October Term, 1992

JOSEPH BRESS, as Executive Director of the Governor's Office of Employee Relations; N.Y.S. DEPARTMENT OF AUDIT & CONTROL; STATE OF NEW YORK; MARIO CUOMO, as Governor of the State of New York; EDWARD V. REGAN, as Comptroller of the State of New York,

Petitioners,

against

RAND CONDELL, as President of Public Employee's Federation, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(2830—LC9-165—1993)

Questions Presented

1. Whether a State, facing the worst fiscal crisis since the Great Depression, may modify by legislation a State employees' collective bargaining agreement without violating the Contract Clause.

2. Whether, given the other alternatives of drastic cuts in public services or massive layoffs, a State may adopt a mandatory "salary deferral" program under which wages withheld would be repaid upon termination of State service at the higher of the salary in effect when withheld or upon termination.

3. Whether a court order directing the refund of salary withholdings is barred by the Eleventh Amendment when the withholding occurred in the past and the court order, though styled as injunctive relief, consisted of a purely retrospective award of money from the State treasury.

Parties.

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

1. Joseph Bress, as Executive Director of the Governor's Office of Employee Relations;

2. New York State Department of Audit & Control;

3. State of New York;

4. Mario Cuomo, as Governor of the State of New York;

5. Edward V. Regan, as Comptroller of the State of New York; and

6. Rand Condell, as President of Public Employee's Federation, AFL-CIO.

Parties numbered 1 through 5 inclusive are petitioners. Party numbered 6 is respondent.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992.

JOSEPH BRESS, as Executive Director of the Governor's Office of Employee Relations; N.Y.S. DEPARTMENT OF AUDIT & CONTROL; STATE OF NEW YORK; MARIO CUOMO, as Governor of the State of New York; Edward V. Regan, as Comptroller of the State of New York,

Petitioners,

against

RAND CONDELL, as President of Public Employee's Federation, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit, printed in petitioners' appendix at pages A3-A13, is

reported at ____ F2d ____ (2d Cir 1993). It is available on WESTLAW at 1993 WL 2909.

The opinion of the District Court, printed in petitioners' appendix at pages A19-A30, is not officially reported. It is available on WESTLAW at 1992 WL 133900.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 8, 1993. This petition was docketed on February 25, 1993. Jurisdiction is invoked under 28 USC § 1254(1).

Statute Involved.

New York State Finance Law, § 200 (2-a [a]), as enacted by L. 1990, ch. 947, § 12.

§ 200. Payment of salaries

2-a. (a) Notwithstanding the provisions of any other law:

(1). For the payrolls covering officers and employees of the state, except as provided in subparagraph (2) of this pargagraph:[1] commencing with the institutional payroll period commencing December 27, 1990, and the administrative payroll period commencing on January 3, 1991, payment on the payment date of the five payroll periods commencing with such dates shall be for nine-tenths of that amount paid each payroll period until a total of five-

[1]So in original. Probably should read "paragraph".

tenths of salary for one payroll period that would be paid but for this subdivision has been withheld. Thereafter, starting with the sixth payroll period after December 27, 1990, or January 3, 1991, as appropriate, payment shall be in the same manner as in effect prior to December 27, 1990, or January 3, 1991.

(2) The provisions of subparagraph (1) of this paragraph shall apply to officers and employees of the state subject to paragraph (1) of subdivision b of section five of chapter 353 of the laws of 1982 commencing with the payroll period (and corresponding payroll date) immediately following the completion of the procedure for the payment of salaries and wages established by the comptroller pursuant to such paragraph of chapter 353 of the laws of 1982.

(3) where salary has been withheld pursuant to this subdivision, in lieu of such salary, an officer or employee who retires or otherwise separates from service, or the beneficiary of an employee who dies, shall be entitled to a lump sum payment equal to the salary so withheld at the rate of basic annual salary in effect at the time of death, retirement, or other separation from service for each day or part thereof for which salary was withheld pursuant to this section, but in no case shall such lump sum payment be less than the amount of salary originally withheld.

Statement of the Case.[1]

1. The magnitude of the budgetary crisis

In the spring of 1990, the State adopted a budget which it reasonably believed was balanced (J.App., 110-111, ¶¶ 10-11). By State Constitutional mandate (N.Y. Const., Art. VII, § 2), New York is required to adopt a balanced budget prior to the start of each fiscal year beginning April 1. Unforeseen events in 1990 occurred which dramatically changed the economy and the budget, leading to a major deficit crisis in the fall of 1990 (J.App., 108, ¶ 2). The Legislature, the Governor and the New York State Division of the Budget ("DOB"), when they made predictions for fiscal year ("FY") 90-91 in the spring of 1990, could not have known that Iraq would invade Kuwait (J.App., 110, ¶ 8; 232). Using the best available economic information from a variety of sources, the State passed a budget in May 1990 which it reasonably believed would be balanced (J.App., 110, ¶ 10 — 112, ¶ 14; 174, ¶¶ 17-19; 203, ¶ 4; 214).

By October 30, 1990, when DOB issued its "Mid-Year Financial Update", there were drastically lower estimates of tax revenues for the remainder of the fiscal year ending March 31, 1991 (J.App., 115, ¶ 22 — 116, ¶ 23; 160-161; 228). Outside economic reporting services described the economy at that time as a national recession (J.App., 214; 99; 110, ¶ 8; 185-186, ¶ 20; 229-248, esp. 231).

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[1]References to "App, A _____ " refer to pages of the Appendix to this Petition. References to "J.App., _____ " refer to pages of the Joint Appendix in the Court of Appeals.

Within the next few weeks, the Governor and DOB took drastic action to reduce what was then predicted to be a deficit of more than a *billion* dollars for the remainder of FY 90-91 (J.App., 141-142; 160-161; 93, ¶ 20; 116, ¶ 24). The unfortunate timing of such a large deficit so late in the fiscal year was very significant (J.App., 116, ¶ 24). New revenues, such as from new taxes, are particularly difficult to implement, since those revenue-raising devices have enormous "lead time" to promulgate implementing rules and interpretive regulations (J.App., 117-118, ¶ 27).

Additionally, the Legislature and the Governor did not want to increase so-called broad-based—income, sales and general business—taxes (J.App., 117-118, ¶ 27). New York was already one of the highest tax States in the nation and in the region (J.App., 118, ¶ 27; 258). State policy-makers believed that an increase in broad-based taxes would further an exodus of business and jobs from the State (J.App., 117-118, ¶ 27; 125, ¶ 39).

Although it was possible to issue so-called "deficit notes" (short term borrowings) (*see* N.Y. Const., Art. VII, § 12), that was inadvisable because it would only aggravate the deficit in the next fiscal year beginning April 1, 1991 (J.App., 118, ¶ 28; 168, ¶ 4; 175-176, ¶ 23). The projected deficit for FY 91-92 was $6 billion, a problem that would itself need a combination of new revenues and spending reductions in spring of 1991 to attain a balanced budget for FY 91-92 (J.App., 123, ¶ 38). In the past, the use of deficit notes had worsened the State's credit rating (117, ¶ 26; 168, ¶ 4; 175-176, ¶ 23). In any event, deficit notes would have had to have been repaid out of the FY 91-92 budget, since the State is required to submit a balanced budget (which includes repayment of prior deficit notes) at the start of the

fiscal year (J.App., 131, ¶ 4; 133, ¶ 7[a]; 169-177, ¶¶ 6-12; 224; 281).

To close the billion dollar deficit for the remainder of FY 90-91, the State implemented a deficit reduction plan which included, among other measures, a complete hiring freeze throughout the Executive Branch (J.App., 115, ¶ 22; 160-161; 244, 249-257). Additionally, the State effected an unprecedented number of reductions in State services, consolidation or elimination of agencies or offices, and numerous other austerity measures (J.App., 166, ¶ 8; 171, ¶ 10; 174-175, ¶ 21; 244; 249-257).

Since a very large percentage of the budget is earmarked for welfare and social services benefits, which are very difficult to trim (J.App., 106; 207, ¶ 3; 240; 277), the bulk of the deficit had to be addressed by reducing labor costs—either through layoffs, furloughs or other measures (J.App., 118-119, ¶ 29; 208). As Budget Director Bulgaro explained (J.App., 121, ¶ 33):

> Since direct personnel costs (i.e. salaries) account for 70% of state agency operations, the achievement of $1 billion in total DRP [deficit reduction plan] savings required a reliance on actions to reduce those personnel costs. Although the DRP included attrition (keeping vacant positions open without refilling them) [,] a formal hiring freeze, and layoffs (mandated separation from State service), these options could not generate the necessary level of savings. Approximately $45 million was anticipated through attrition and a hiring freeze, and about $12.5 million through layoffs. Additional savings from attrition and hiring freezes were not possible since only a few

> months remained in the fiscal year. And, although additional layoffs could have been used to generate a portion of the remaining $128 million in required savings, the adverse impacts on State programs and employees would have been unacceptable.

The Governor proposed a mandatory furlough of Executive Branch employees for 5 days without pay (J.App., 119, ¶ 30; 164, ¶ 1; 294, ¶ 1). The unions opposed any furloughs and the Legislature rejected the Governor's proposal for employee furloughs (J.App., 70; 119-120, ¶ 31; 164, ¶ 1; 190-191, ¶ 31). The Legislature then enacted the salary deferral program for the Executive Branch of the state (J.App., 36, ¶ 13; 38, ¶ 20; 71).

The salary deferral program had about the same financial savings as a furlough plan (J.App., 119-120, ¶ 31). Both had the distinct advantages of avoiding layoffs (J.App., 119, ¶ 30). Layoffs were considered as an option to save $128 million in fiscal 90-91 (J.App., 121, ¶ 34; 176, ¶ 25). However, 30,000 state workers would have been laid off (J.App., 121, ¶ 34).

> This approach would have brought many smaller agencies to a virtual standstill and would have severely curtailed and delayed the delivery of essential public services by agencies such as the Departments of Health, Motor Vehicles, Transportation and Environmental Conservation. (J.App., 121-122, ¶ 34).

Even then, the savings from layoffs would have been nullified in certain areas, such as in the Offices of Mental Health and Mental Retardation and the Department of Corrections,

where facilities must operate 24 hours a day and where overtime payments to remaining employees would have resulted (J.App., 122, ¶ 35; 176-177, ¶ 25). Only the salary deferral plan, however, kept employees working to avoid disruptions to necessary services (J.App., 119, ¶ 30).

In agreeing with the Legislature that State employees throughout the Executive Branch should shoulder their fair share of the budgetary crisis, the Governor undoubtedly saw it as the lesser of two evils, since the only plausible alternative was massive layoffs throughout the Executive Branch (J.App., 119-120, ¶ 31; 271-272).

Those are the stark facts of the budget crisis which faced New York officials in December of 1990. Simply stated, the State of New York was facing its most severe economic disaster since the Depression (J.App., 122, ¶ 37; 128, ¶ 47; 165, ¶ 6; 260).

2. **The salary deferral plan in question**

As a partial solution to the budget deficit, the New York State Legislature enacted the "salary deferral" program at issue in this case. *See* L. 1990, ch. 947, § 12 ("Chapter 947"); *codified at* N.Y. State Finance Law, § 200 (2-a [a]). The billion dollar "deficit closing" program included $199 million in new or increased revenues, as well as $802 million in reductions in expenditures (J.App., 120, ¶ 32; 249-257). Fully one-quarter of that reduction in spending ($200 million) was projected from the Chapter 947 salary deferral plan here at issue (J.App., 120, ¶ 32). Chapter 947 implemented a "lump sum separation payment" program in which the equivalent of five days' pay was withheld from Executive Branch employees during the last quarter of FY

90-91, *i.e.*, between January 1, 1991 and April 1, 1991 (J.App., 120, ¶ 32).

This statute had the effect of a reduction in salary of one week's pay for every employee of the Executive Branch of New York State government. It was implemented by a reduction of salary for five payroll periods (ten calendar weeks) of gross salary by ten percent. The mechanics and details of the salary deferral program are spelled out in the Office of State Comptroller's *Payroll Bulletin No. P-679*, reprinted in the Appendix at A33-A42.

3. Decisions in the courts below

In a memorandum-decision and order (App, A19-A30; J.App., 305-316; not reported in F.Supp.; available on WESTLAW at 1992 WL 133900), the district court declared Chapter 947 unconstitutional as violative of the Contract Clause (App, A19-A30; J.App., 308, 315-316). The district court based its ruling on prior cases which had found similar "lag payroll" statutes unconstitutional (App, A22-A28; J.App., 308, 315-316).

The Court of Appeals affirmed in an opinion which relied heavily on prior "lag payroll" decisions (App, A7-A12). *See Association of Surrogates v State of New York*, 940 F2d 766 [2d Cir 1991], *cert. denied*, ____ US ____, 112 S Ct 936, 117 L Ed 2d 107 [1992])[2] ("*Surrogates I*"); *Association of Surrogates v State of New York*, 79 NY2d 39, 580 NYS2d 153 (1992) ("*Surrogates II*").

[2]The petition for a writ of certiorari in *Surrogates I* raised only the question of the Eleventh Amendment.

Reasons for Granting the Writ.

This case raises two important issues, each of which independently warrants the grant of a writ of certiorari. *First*, the case involves important questions of the power of States, consistent with the Contract Clause, to modify labor contracts with public employees as an alternative to massive layoffs or drastic reductions in public services. The court below construed this reserved "police power" of the States so narrowly (or, correlatively, the scope of the Contract Clause so broadly) that even a fiscal crisis of historic proportions would not qualify as a valid ground to modify public employees' contracts. *Second*, the court below erred in not giving effect to the protection afforded States against monetary judgments under the Eleventh Amendment. The Second Circuit's reliance on its own prior precedents was unjustified and contrary to decisions of this Court.

In the pages which follow, we briefly explain the merits of both of these issues.

I.

The Second Circuit misconstrued the scope of the Contract Clause.

Contrary to the belief of the Second Circuit, the severity of the State's fiscal crisis in 1990 places this case squarely within the range of permissible modification of governmental labor contracts. This is apparent from examination of the Contract Clause cases which analyze the issues of the "reasonableness" of, and "necessity" for, substantial impairments of contract rights.

A finding of impairment of contract rights is but a preliminary step, since it must be counterbalanced against the "essential attributes of sovereign power" necessarily reserved by the States to safeguard the welfare of its citizens. *Home Bldg. & Loan Assn. v Blaisdell*, 290 US 398, 435 (1934); *United States Trust Co. of New York v New Jersey*, 431 US 1, 21-23 (1977). Although, to be sure, contracts to which the State is itself a party are subject to close scrutiny (*United States Trust Co.*, 431 US at 25-26), that does not mean that little or no deference is to be paid to legislative findings.

Admittedly, *United States Trust Co.* stated that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake". 431 US at 26. However, *United States Trust Co.* did not hold that little or no deference was to be accorded legislative judgments as to reasonableness and necessity. As the New York Court of Appeals explained in a case involving New York City's financial crisis of the mid-1970s, the mere statement of the principle in *United States Trust Co.* that *complete* deference to legislative assessment of reasonableness is not appropriate "itself implies that *some* deference at least is appropriate". *Subway-Surface Supervisor's Assn. v New York City Tr. Auth.*, 44 NY2d 101, 112, 404 NYS2d 323, 329 (1978) (emphasis added).

United States Trust Co., which did not deal with a fiscal emergency, simply did not decide what the limits of a State's powers were in a fiscal emergency. The contract breached in *United States Trust Co.* was a covenant with bond-holders of the Port Authority of New York and New Jersey. Under the terms of that covenant, the Authority

pledged that it would not use any funds pledged as security for those bonds for any other purpose. Twelve years after signing those covenants, the Port Authority repealed that covenant outright. The Authority repudiated the bond covenant not because of a fiscal crisis, but instead out of a desire to implement a bi-state plan to encourage the use of public transportation. 431 US at 32.

This Court in *United States Trust Co.* cited approvingly a number of Depression-era and New Deal cases which upheld mortgage moratoria and other measures designed to protect the general public from the ravages of the Depression. *See, e.g., Home Bldg. & Loan Assn. v Blaisdell*, 290 US 398, 438-439 (1934) (upholding, against a Contract Clause challenge, a law authorizing state courts, for the duration of the economic emergency declared to exist by the legislature, to extend the period of redemptions from foreclosure sales); *Faitoute Iron & Steel Co. v City of Asbury, N.J.*, 316 US 502, 515-516 (1942) (upholding a receivership plan by which the creditors of a bankrupt municipality received substitute securities with lower interest rates and later maturity dates); *see also, Viex v Sixth Ward Bldg. & Loan Assn. of Newark*, 310 US 32, 40-41 (1940); *East N.Y. Sav. Bank v Hahn*, 326 US 230, 232, 234-235 (1945).

Determination of whether an impairment is "necessary" requires consideration of the magnitude of the public purpose in question. Obviously, a fiscal crisis so severe that it threatens to put people out of their homes and onto the streets would qualify. *Home Bldg. & Loan Assn. v Blaisdell*, 290 US at 434. Likewise, a stop-gap measure to stave off municipal bankruptcy would qualify. *Faitoute Iron & Steel Co.*, 316 US at 515. Similarly, a drastic municipal budget crisis would qualify. *Subway-Surface Supervisors Assn.*, 44

NY2d at 112-113, 404 NYS2d at 329-330. On the other hand, a merely desirable—as distinct from necessary—public policy of substituting public transit for automobiles for commutation purposes did not qualify. *United States Trust Co.*, 431 US at 32.

In the case at bar, the Court of Appeals gave mere lip service to the doctrine that a severe fiscal crisis may give the States more leeway to modify a pre-existing public employee contract (App, A11-A12). In actuality, the Second Circuit rendered the State's contract modification power a nullity. If the worst fiscal crisis since the Great Depression[3] does not qualify, it is hard to see what level of disaster short of imminent bankruptcy would qualify under the Second Circuit's analysis.

It bears emphasis that the salary reduction here was not a total confiscation; rather, it was a salary deferral (N.Y. State Finance Law, § 200 [2-a (a) (3)] [reprinted in Petition at 3]). The statute in question provided for the refund of the money withheld upon retirement or termination from State employment (App, A39). Moreover, the refund would be at the higher of the salary in effect at the time of the withholding or at the time of termination of employment (App, A39). Thus, any employees who received a pay raise, promotion or other salary increase would automatically (upon termination) be entitled to a refund of the withholdings at a higher rate of pay (App, A39).

The public interest in continuing vital governmental services (*see* J.App., 121-122, ¶¶ 34-36; 127-128,

[3]It is factually undisputed in the Record that the fiscal crisis facing the State in December 1990—when Chapter 947 was enacted—was the worst facing the State since the Depression (J.App., 122, ¶ 37; 128, ¶ 47; 165, ¶ 6; 260).

¶¶ 45-46; 176, ¶ 24), as well as the severity of this budget crisis (J.App., 116-118, ¶¶ 24-27), demonstrates a sufficient public purpose, in the context of a 1.92% wage deferral, to satisfy the test of the Contract Clause that the means chosen are reasonable and necessary in light of the magnitude of the public need. In similar circumstances involving New York City's fiscal crisis of the mid-1970s, the New York Court of Appeals upheld a 5% wage-deferral statute against a Contract Clause challenge by municipal workers who had a contractual right to those wages under a collective bargaining agreement. *Subway-Surface Supervisor's Assn.*, 44 NY2d at 106-107, 404 NYS2d at 326. In rejecting plaintiffs' constitutional argument in that case, the New York Court of Appeals explained (44 NY2d at 111-112, 404 NYS2d at 329):

> Faced with the financial distress under which the city was laboring and which threatened to overwhelm it, * * * the New York State Legislature determined that the imposition of the terms of the wage-freeze legislation on the employees of the authority, as well as on those employed by the city itself and by other related organizations, was a necessary and appropriate step toward relieving the financial crisis and thereby continuing the performance of governmental services. * * * [T]he circumstances themselves so clearly demonstrate that the Legislature's conclusion was a valid one. (Footnote omitted.)

The court below simply jumped on the bandwagon of striking down lag payrolls because the other, somewhat similar, legislative measures had been struck down in *Surrogates I*, 940 F2d 766, and *Surrogates II*, 79 NY2d 39, 580 NYS2d 153. *Surrogates I* and *Surrogates II* are distinguish-

able in material respects from the case at bar. Those cases involved comparatively minor amounts of money and did not entail the threatened cutback of basic governmental services or the specter of massive layoffs. *Surrogates I* involved only $7 million dollars in a judiciary budget of almost $1 billion. *Surrogates I*, 940 F2d at 769, 773. Moreover, the money in question there was earmarked for expansion of the court system. 940 F2d at 768, 773. Similarly, *Surrogates II* involved only $10.7 million, earmarked at restoring to the judiciary budget the lag payroll funds ordered to be repaid to court employees in *Surrogates I*. *See*, *Surrogates II*, 79 NY2d at 43-44, 580 NYS2d at 154-155. Moreover, the lag payroll at issue in *Surrogates I* was enacted near the beginning of FY 90-91, well before the fiscal crisis materialized. *See*, L. 1990, ch. 190, § 375 (enacted May 25, 1990). The lag payroll in *Surrogates II* was enacted in 1991 in an attempt to replace the money ordered refunded in *Surrogates I*. *See*, L.1991, ch. 166, § 382 (enacted June 15, 1991).

Thus, it is readily apparent that neither *Surrogates I* nor *Surrogates II* involved a genuine fiscal crisis for purposes of the "reasonable and necessary" inquiry under the Contract Clause cases.

By contrast, the "salary deferral" program enacted in December of 1990 involved $128 million in direct reductions in expenditures for FY 90-91 (J.App., 120, ¶ 32).[4] The salary deferral and related reductions in labor costs in con-

[4]In the case at bar, involving one of several public employee unions, $50,000,000 is in controversy. Other public employee unions, whose members collectively experienced salary deferrals of $78,000,000, have settled their lawsuits with the State as part of successor collective bargaining agreements.

nection with Chapter 947 were projected to reduce spending by $200 million (J.App., 120, ¶ 32). In other words, the savings in FY 90-91 from Chapter 947 accounted for fully one-fourth of the $800 million in reductions in expenditures (J.App., 130, ¶ 32). The remaining $200 million of the billion dollar deficit was closed by new or increased revenues from taxes (J.App., 249-257). Thus, the salary deferral program in question is distinguishable, in amount, in importance, and in substance from the lag payroll programs nullified in *Surrogates I* and *Surrogates II*.

In the current economic and fiscal climate[5], the proper interpretation of the Contract Clause in the context of governmental labor contracts is an issue worthy of plenary review. States need to know with some measure of certainty what management tools may legitimately be used to solve budget crises. That the Contract Clause limits governmental power to abrogate public employment contracts is readily conceded; the problem here is that the Second Circuit's analysis went much too far in limiting the State's right to modify public employee contracts where the only other reasonable alternatives were drastic layoffs of public employees and the concomitant disruptions of public health, safety and welfare services.

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[5]See *State of the Union Address* (President Clinton), February 17, 1993.

II.

The Second Circuit's order of purely monetary relief contravenes the Eleventh Amendment.

The decision below, in ordering the State to refund about $50 million, is plainly in violation of the constraints imposed by the Eleventh Amendment and in conflict with this Court's consistent decisions. Review by this Court is warranted to correct this patent error.

By the time the district court entered its judgment on June 18, 1992 (*see* App, A18; J.App., 317), the Chapter 947 salary deferral program had been fully implemented, and the money saved had been spent in FY 90-91. Thus, the substance of the case at bar, though couched in terms of injunctive and declaratory relief, was purely and simply to obtain a refund from the State Treasury of respondent's $50,000,000 share of the salary deferral plan.[6]

Chapter 947 reduced the annual salary by five days' pay. This occurred over a ten-week, or five-payday, period, during which the gross salary of each Executive Branch employee's paycheck was reduced by 10%.

As of April 1, 1991 (the start of FY 91-92), the consequences of the salary deferral program had been fully accomplished, except as to persons hired thereafter. As to the previously deferred salary, the only way to restore the Chapter 947 funds to the Executive Branch employees is to write a check for the amounts withheld. That is purely and

[6]A relatively minor aspect of the judgment, (App, A18, A37; J.App., 317) operates to enjoin the implementation of the salary deferral program for any newly-hired employees. Defendants acknowledge that the Eleventh Amendment provides no defense to such purely prospective relief.

substantively a retroactive payment from the Treasury for past violations of the Constitution (assuming, *arguendo*, that Chapter 947 was not justified as reasonable and necessary; *see* Point I, *supra*).

Such a retroactive award of money damages is plainly barred by the Eleventh Amendment. Where the action is in essence one for the recovery of money from the State, the State is the real, substantial party in interest and the Eleventh Amendment stands as a bar to a federal court's exercise of jurisdiction. *Ford Motor Co. v Department of Treasury of State of Indiana*, 323 US 459, 464 (1945) (even though plaintiff prevailed in a suit against Indiana officials on the basis that its tax department wrongfully assessed income taxes on sales claimed to have occurred in Indiana, the Eleventh Amendment barred the claim for a tax refund).

The decisive distinction is between *prospective* relief and *retrospective* relief. Purely prospective relief, such as an injunction directed to *future* conduct—as, for example, a directive to conform conduct to federal law—is not barred by the Eleventh Amendment, whereas a refund of moneys wrongfully withheld in the past *is* barred by the Eleventh Amendment. *Compare*, *Quern v Jordan*, 440 US 332, 346-349 (1979) (an injunction in a welfare class action suit directing the defendants to furnish a simple explanatory notice to class members [advising them of their state administrative procedure rights] was not barred by the Eleventh Amendment), *with*, *Edelman v Jordan*, 415 US 651, 663 (1974) ("a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment").

In *Edelman*, the State of Illinois wrongfully withheld welfare funds from eligible recipients. 415 US at 653-656.

The district court, after finding that the State violated federal regulations with respect to such benefits, ordered Illinois to cease violating the regulations *and to refund benefits wrongfully withheld*. *See* 415 US at 656. Although the Court of Appeals affirmed, the Supreme Court reversed that portion of the Seventh Circuit's decision which upheld the order directing retroactive benefits. 415 US at 658-659.

Quern was a later case arising out of the same facts as *Edelman*. Although *Quern* allowed prospective relief, the Court drew a clear line between violations of federal law which occurred prior to the entry of the court's order determining the wrongfulness of the defendant's conduct (as to those, the Eleventh Amendment was a total and complete bar) and certain steps directed towards preventing future violations of federal law after the date of adjudication (as to those, the Eleventh Amendment was not a bar). *Quern*, 440 US at 333, 337; *see also*, *Granados v Reivitz*, 776 F2d 180, 183 (7th Cir 1985) ("This action, although couched in declaratory and injunctive relief terms, seeks purely retrospective damages from a state. As such, it is prohibited by the eleventh amendment.").

Those authorities are dispositive here. The substance of respondent's claim was a refund of money, pure and simple. That relief is barred by the Eleventh Amendment as a retroactive award of damages. A refund of salary previously withheld pursuant to Chapter 947 is plainly such an impermissible retroactive award of money damages.

The Second Circuit brushed off the State's Eleventh Amendment argument in reliance on prior Second Circuit caselaw, principally the "lag payroll" case of *Surrogates I*, 940 F2d 766, *cert. denied*, ____ US ____, 112 S Ct 936, 117 L Ed 2d 107 (1992) (*see* App, A9, A12-A13). To the extent

that the court below labelled the instant case as a "lag payroll" case, that is a misnomer and highly significant in the Eleventh Amendment context.

In *Surrogates I*, which was properly characterized as a "lag payroll" case, the mechanism used was in one significant way very different from the present salary deferral mechanism. In *Surrogates I*, prior to institution of the lag, employees were paid immediately after the pay period to which the paycheck related. Once the lag was fully implemented, paychecks related to the pay period which had ended two weeks earlier. In that situation, the Second Circuit was able to undo the error it found by ordering future paychecks to be paid on a non-lagged basis in conformity with the contract as the court read it. While that cost the State money, the relief mechanism was an order requiring the State's paymasters to comply with the law prospectively.

By contrast, in the present case, prior to the deferral, there was a two-week lag that had originated in 1982 under a collective bargaining agreement. That two-week lag remained at the end of the salary deferral implemented by Chapter 947 of the Laws of 1990. Here, instead of simply delaying receipt of pay by two weeks on a continuing basis, as a result of the deferral, one week's pay will not be received until termination of the employment relationship. Mechanically, the deferral can only be undone by a refund check, not by elimination of a new lag period since none had

been created (App, A33). Reliance below on *Surrogates I* was in disregard of this Court's teachings under the Eleventh Amendment. Certiorari should be granted.

CONCLUSION

This court should grant a Writ of Certiorari.

Dated: Albany, New York
February 24, 1993

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of
New York
Attorney for Petitioners

JERRY BOONE
Solicitor General
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

MICHAEL S. BUSKUS
Assistant Attorney General
of Counsel

Judgment of the Second Circuit (1/8/93)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of January, one thousand nine hundred and ninety-three.

Present:

Hon. Wilfred Feinberg, Hon. J. Daniel Mahoney, Circuit Judges.

Hon. Robert F. Peckham, District Judge*.

RAND CONDELL, as President of the Public Employees Federation, AFL-CIO,

Plaintiffs-Appellee,

against

JOSEPH BRESS, as Executive Director of the Governor's Office of Employee Relations; N.Y.S. DEPARTMENT OF AUDIT & CONTROL; STATE OF NEW YORK; MARIO CUOMO, as Governor of the State of New York; EDWARD V. REGAN, as Comptroller of the State of New York,

Defendants-Appellants.

92-7772

Appeal from the United States District Court for the Northern District of New York.

The Honorable Robert F. Peckham, Senior United States District Judge for the Northern District of California, sitting by designation.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said District Court be and it hereby is affirmed in accordance with the opinon of this court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH, Clerk
By:
EDWARD J. GUARDARO
Staff Attorney

UNITED STATES COURT OF APPEALS
FILED
JAN 8 1993
ELAINE GOLDSMITH, CLERK
SECOND CIRCUIT

Opinion of the Second Circuit (1/8/93)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 523—August Term 1992

Argued: November 20, 1992 Decided: January 8, 1993

Docket No. 92-7772

RAND CONDELL, as President of the Public Employees Federation, AFL-CIO,

Plaintiffs-Appellee,

—against—

JOSEPH BRESS, as Executive Director of the Governor's Office of Employee Relations; N.Y.S. DEPARTMENT OF AUDIT & CONTROL; STATE OF NEW YORK; MARIO CUOMO, as Governor of the State of New York; EDWARD V. REGAN, as Comptroller of the State of New York,

Defendants-Appellants.

Before:

FEINBERG and MAHONEY, *Circuit Judges,*
and PECKHAM,* *District Judge.*

* Honorable Robert F. Peckham, Senior United States District Judge for the Northern District of California, sitting by designation.

Appeal from judgment of United States District Court for the Northern District of New York, Frederick J. Scullin, Jr., J., holding that statute providing for salary deferral, commonly referred to as "lag payroll" statute, was unconstitutional impairment of contract.

Affirmed.

MICHAEL S. BUSKUS, Albany, NY, Assistant Attorney General of the State of New York (Robert Abrams, Attorney General of the State of New York, Peter H. Schiff, Deputy Solicitor General, of Counsel), *for Defendants-Appellants.*

NANCY L. BURRITT, Albany, NY, *for Plaintiff-Appellee.*

FEINBERG, *Circuit Judge*:

This is an action by a public sector labor union for a judgment declaring unconstitutional a salary deferral program, commonly referred to as a "lag payroll," implemented pursuant to a New York statute. Defendants State of New York and various state officials appeal from a judgment of the United States District Court for the Northern District of New York, Frederick J. Scullin, Jr., J., holding that the statute was an impairment of contract prohibited by the United States Constitution. For the reasons set forth below, we affirm the judgment of the district court.

I. Background

Plaintiff Public Employees Federation, AFL-CIO (the Union) represents some 50,000 employees of the executive branch of the State of New York who furnish professional, scientific and technical services. The Union and the State of New York entered into a collective bargaining agreement for the period of April 1, 1988 through March 31, 1991. The agreement provided that salary payments be computed on the basis of 10 working days. In addition, the agreement set forth designated annual salary levels and continued a two-week lag payroll that had been negotiated in 1982.

In December 1990, the state legislature enacted Chapter 947, § 12, *reprinted in* N.Y. State Fin. Law, § 200 (2-a[a]) (McKinney Supp. 1992), which imposed a five-day lag payroll on executive branch employees, including the employees represented by the Union. Pursuant to Chapter 947, the affected employees received only nine-tenths of their salary for each of five bi-weekly periods between December 27, 1990 and March 31, 1991. The withheld compensation would not be released until the employee died, retired or otherwise left state employment. Under the statute, employees who were hired after December 27, 1990 would be subject to this lag during their first 10 weeks of employment.

The state legislature enacted Chapter 947 as a response to a budget deficit estimated by defendants to be $1.005 billion in November 1990. At that time, the Governor of the State of New York made known his intention to eliminate the budget deficit without issuing Tax and Revenue Anticipation Notes, levying new taxes, raising rates on existing taxes or laying off additional executive branch employees. These options, singly or in combination, were rejected as "unwise fiscal policy." It was thought they would cause "further damage to the state's competitive position vis-a-vis other states" or have

"unacceptable" adverse impacts on state programs and employees. In other words, the state had alternatives, but not "acceptable" ones. Instead of pursuing those alternatives, the state chose to withhold lagged wages from executive branch employees to raise $128 million of the more than $1 billion estimated as necessary to balance the state budget. Despite the Governor's deficit reduction plan, the enactment of Chapter 947 and the subsequent withholding of lagged wages, the state ended up issuing Tax and Revenue Anticipation Notes to close what had become an actual budget gap of $1.081 billion at the end of the 1990-91 fiscal year.

II. Proceedings Below

Plaintiff Union brought this action for declaratory and injunctive relief in January 1991. In its amended complaint, the Union sought, among other things, a declaration that Chapter 947 violated Article I, § 10 of the United States Constitution (the Contract Clause) and denied substantive due process under the Fourteenth Amendment. The amended complaint also sought permanent injunctive relief against the operation of Chapter 947 and the release to employees in the bargaining unit represented by the Union the salary withheld pursuant to Chapter 947.

The Union moved for summary judgment on the Contract Clause and Fourteenth Amendment claims. Defendants cross-moved for summary judgment on the grounds that Chapter 947 was not an unconstitutional impairment of contract; that Chapter 947 was not arbitrary government action violative of substantive due process; and that the district court lacked subject matter jurisdiction under the Eleventh Amendment.

In a memorandum opinion and order, dated June 9, 1992, the district court held that Chapter 947 violated the Contract

Clause. The judge enjoined defendants from "continuing the effects and application" of Chapter 947 and directed the state to "return the withheld monies, plus interest." This appeal followed.

III. Discussion

The Contract Clause provides in pertinent part: "[N]o state shall . . . pass any . . . law impairing the obligation of contracts . . ." Although this language is absolute, finding an "impairment" is in fact a preliminary step toward "resolving the more difficult question whether that impairment is permitted under the Constitution." Association of Surrogates and Supreme Court Reporters Within the City of New York v. State of New York, 940 F.2d 766, 771 (2d Cir. 1991), cert. denied, 112 S. Ct. 936 (1992) (Surrogates I) (quoting United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 21 (1977)). In cases involving private contracts, courts must first determine whether the legislation causes a "substantial" impairment and then, if it does, whether the legislation is a "reasonable" means to a "legitimate public purpose." Id. Where social or economic measures are involved, courts will defer to legislative judgment in determining whether particular actions are "reasonable and necessary." United States Trust, 431 U.S. at 25. Courts are less deferential to a state's judgment of reasonableness and necessity when a state's legislation is self-serving and impairs the obligations of its *own* contracts. Indeed, "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives." Id. at 30-31.

This Court, in *Surrogates I*, and the New York Court of Appeals, in Association of Surrogates and Supreme Court Reporters Within the City of New York v. State of New York, 79 N.Y.2d 39 (1992) (Surrogates II), determined that

legislation similar to that in the present case was unconstitutional. The plaintiffs in both *Surrogates* cases were nonjudicial employees of the state Unified Court System whose collectively bargained-for rights were affected by the state legislative action.

Surrogates I concerned a May 1990 statute set forth in 1990 N.Y. Laws, ch. 190, § 375, which authorized New York State to pay the affected employees nine days' salary rather than 10 in each of 10 successive two-week pay periods. Surrogates I, 940 F.2d at 769. Thus, employees were paid for a total of 50 instead of 52 weeks for the fiscal year ending March 31, 1991. The two weeks' withheld pay was to be repaid to the employees upon the termination of their employment with the state at their then applicable rate of pay. Id. This measure was expected to save the state approximately $7 million. As in the present case, the employees in *Surrogates I* were parties to collective bargaining agreements with the state that included the provision that "bi-weekly salaries will be computed on the basis of 10 working days." Id. at 770.

This Court held that there was a contractual impairment and that it was substantial. Id. at 771-72. We reasoned that withholding an amount equal to 10 percent of an employee's pay over a 10-week period could prevent the employee from meeting short-term financial obligations like mortgages, loans, credit card payments and the like. Id. at 772. We also pointed out that payment to an affected employee of the money withheld could be postponed perhaps as long as 45 years if the employee devoted an entire career to government service. Id. We rejected the defendants' contention that the substantial impairment was reasonable and necessary for the state's goals, since "[t]he state could have shifted the seven million dollars from another governmental program, or it could have raised taxes." Id. at 773. We held that

> [t]he contract clause, if it is to mean anything, must prohibit New York from dishonoring its existing contractual obligations when other policy alternatives are available . . . . Were we to uphold this lag-payroll legislation, one wonders if the employees would ever receive their lagged wages, or whether another one of the state's perennial "fiscal crises" . . . would justify deferring again, or even cancelling, the lagged wages when they eventually become due.

Id. at 774 (citation omitted).

We also rejected the state's challenge to jurisdiction on the ground that the lag payroll had been completed as of March 31, 1991, rendering the claims for declaratory and injunctive relief moot, limiting the plaintiffs' remedy to "retroactive money relief" and thus barring them under the Eleventh Amendment. Id. We reasoned that, although the money had already been withheld,

> [t]he lag payroll continues, and will continue, to impair the state's contractual obligations by deferring every salary check of each employee . . . until the employee leaves the service of the state, . . . and will, therefore, be enjoined.

Id. Since we found the injunction against the lag payroll to be a prospective remedy, we held that directing the defendants to return the withheld money was proper,

> since the eleventh amendment does not bar suits against state officers to enjoin violations of federal law, and any monies that will be restored to the plaintiffs from the state treasury are ancillary to the prospective relief which we order.

Id.

Surrogates II, 79 N.Y.2d 39, involved the state's attempt, via legislative amendments to the state Finance Law, 1991 N.Y. Laws, chs. 166 § 382 and 171 § 1, *reprinted in* N.Y. State Fin. Law § 200 (2-b) (McKinney Supp. 1992), to save $10.7 million and offset anticipated state budget shortfalls for the fiscal year 1991-92 by paying employees for nine rather than 10 days in each bi-weekly salary check over five payroll periods. The New York Court of Appeals, applying the rationale set forth by this Court in *Surrogates I*, struck down this legislation. The New York court held that the impairment of contract was substantial, as in *Surrogates I*, for essentially the same reasons. Surrogates II, 79 N.Y.2d at 46-47.

Defendants contest the relevance of *Surrogates I* to the issue of substantial impairment in the present case. They point out that the lag payroll here postpones receipt of only five days pay, compared to the 10 days involved in *Surrogates I*. Defendants neglect to mention, however, that the lag payroll in *Surrogates II* involved pay for only five days, exactly as in the present case. The New York Court of Appeals pointed out there that the amount withheld was 10 percent of an employee's earned salary for 10 weeks and this "is not an insubstantial impairment to one confronted with monthly debt payments and daily expenses for food and the other necessities of life." 79 N.Y.2d at 46-47. The same reasoning applies here. In sum, we agree with the district court that the reasoning of the *Surrogates* cases is clear and controlling. We therefore find, as a matter of law, that Chapter 947 effects a substantial impairment of contract.

The question still remains whether the enactment of Chapter 947 was "reasonable and necessary to further an important public purpose." United States Trust, 431 U.S. at 25. Defendants contend that the number of affected employees in this case, as well as the unusual severity of the financial crisis at the time Chapter 947 was enacted, make this legislation

"reasonable and necessary" even if the legislation at issue in *Surrogates I* or *II* was not.

Defendants argue first that Chapter 947 survives scrutiny because it "inflicts pain" on more people than the statutes at issue in the prior two *Surrogates* cases. At first blush, this seems to imply that a sufficient increase in the number of people whose contracts have been impaired will validate an otherwise unconstitutional statute, surely an unattractive proposition. But defendants' point is that placing the burden of coping with a fiscal crisis on the shoulders of only a few people, see *Surrogates I*, 940 F.2d at 773, is less fair than "spreading the pain" among many. We agree that the number of people involved is one factor to be considered on the issue of "reasonable and necessary," but we do not regard this factor as dispositive here.

As in the *Surrogates* cases, the pivotal question here is whether the lag payroll measure was reasonable and necessary notwithstanding the availability of other alternatives. On this question, the New York Court of Appeals appeared to flatly conclude in *Surrogates II* that a unilaterally imposed payroll lag could not be reasonable and necessary to accomplish the state's purposes:

> The choice of which revenue-raising or revenue-saving devices should be used is for others, not the courts, but the menu of alternatives does not include impairing contract rights to obtain forced loans to the State from its employees.

Surrogates II, 79 N.Y.2d at 47. Even if that language does not absolutely rule out the use of lag payrolls to fight budget crises, it certainly supports the view that the fiscal crisis must be much worse than that faced here to allow the use of such a device. This Court in *Surrogates I* did not go quite so far as

the New York Court of Appeals but did indicate that lag payrolls could only be used in extreme crises:

> It cannot be said that a lag payroll for only judicial employees was *essential* in order to finance the expansion of the court system. The state could have shifted the seven million dollars from another governmental program, or it could have raised taxes. We recognize that neither alternative would have been popular among politician-legislators, but that is precisely the reason that the contract clause exists—as a "constitutional check on state legislation." In fact, the lag payroll scheme smacks of the political expediency that *United States Trust Co.* warned of: "A governmental entity can always find a use for extra money, especially when taxes do not have to be raised."

Surrogates I, 940 F.2d at 773 (emphasis supplied) (citations omitted).

While we do not question that New York State faced a very difficult problem, our own prior decision in *Surrogates I*, supported by the reasoning of *Surrogates II*, leads us to conclude that the conditions that might justify the use of lag payrolls were not present here. Just as in *Surrogates I*, other (albeit unpopular) alternatives existed. Indeed, defendants' reply brief lists a number of measures that the state took to bridge an apparently greater budget gap in the following fiscal year. We agree with the district court that the difference in severity between the two fiscal crises is not enough to justify a different result.

Finally, the state's attempt to characterize the withholding as a "lump sum separation payment" rather than a lag payroll does not persuade us that the release of the withheld money is barred by the Eleventh Amendment or that the action is moot

because the withholding was completed as of March 31, 1991. In the words of the district court:

> The facts remain that the money was withheld, continues to be withheld, and will remain withheld until the employees leave State employ. The money "rolls over" each pay period, year to year, until the time of the employee's termination. Therefore, the claims for declaratory judgment and injunctive relief are not moot. As in *Surrogates I*, the injunctive relief sought is a prospective remedy, and any monies returned to . . . employees would be ancillary to this prospective relief and thus not barred by the Eleventh Amendment.

For the purpose of Eleventh Amendment analysis, we do not see any significant difference between the 10-day indefinite withholding of 10 percent of an employee's earned salary at issue in *Surrogates I* and the five-day withholding here.

In view of our disposition, it is unnecessary to address the Union's Fourteenth Amendment claim. As for defendants' remaining arguments, we have considered them and find them to be without merit. Accordingly, the judgment of the district court is affirmed.

Order of the Second Circuit Granting a Stay of the Mandate (2/1/93).

NOTICE OF MOTION FOR A STAY OF THE MANDATE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 92-7772

CONDELL

-v-

BRESS

Motion by

MICHAEL S. BUSKUS
Assistant Attorney General
NYS Department of Law
The Capitol
Albany, NY 12224
(Tel) 518-474-6697

Opposing Counsel:

NANCY E. BURRITT, ESQ.
c/o RICHARD E. CASAGRANDE
1168-70 Troy-Schenectady Road
Albany, New York 12212-2414
Tel (518) 785-1900 ext 241

Has consent of opposing counsel:

A. been sought? [X] Yes

B. been obtained? [X] No

Has service been effected? [X] Yes

Is oral argument desired? [X] No

Has argument date of appeal been set:

C. If Yes, enter date: appeal decided 1993

Judge or agency whose order is being appealed:

Scullin (N.D.N.Y.)

Brief statement of the relief requested:

Stay of mandate pending disposition of petition for a writ of certiorari

By: MICHAEL S. BUSKUS

Attorney for All Defendants-Appellants

Date January 21, 1993

UNITED STATES COURT OF APPEALS
FILED
JAN 22 1993
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted. The application for a stay is granted for 30 days only, strictly in accordance with the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure. No further stay will be granted by the panel.

Dated: 2/1/93

WILFRED FEINBERG
J. DANIEL MAHONEY
Circuit Judges

ROBERT F. PECKHAM
District Judge

UNITED STATES COURT OF APPEALS
FILED
FEB 1 1993
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

Judgment of the District Court (6/18/92)

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

RAND CONDELL, as President of Public Employees Federation, AFL-CIO

Plaintiff,

v.

MARIO CUOMO, *et al.*

Defendants.

CASE NUMBER: 91-CV-0057

[XX] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of Plaintiff, RAND CONDELL, as President of the Public Employees Federation, AFL-CIO, pursuant to the Order of the Honorable Frederick J. Scullin, Jr., stating that Chapter 947 violates the contract clause of the

U.S. Constitution. The Defendants, MARIO CUOMO, as Governor of the State of New York; JOSEPH BRESS, as Executive Director of the Governor's Office of Employee Relations; NEW YORK STATE DEPARTMENT OF AUDIT AND CONTROL; EDWARD V. REGAN, as Comptroller of the State of New York; and the STATE OF NEW YORK, are hereby enjoined from continuing the effects and application of Chapter 947 and are directed to return the withheld monies, plus interest in the amount of seven percent calculated from March 31, 1991, to the Plaintiffs' within sixty days of this judgment.

GEORGE A. RAY
Clerk

BARBARA J. WOODFORD
(By) Deputy Clerk

U.S. DISTRICT COURT
N.D. of N.Y.
FILED
JUN 18 1992
____ O'CLOCK ____M
GEORGE A. RAY, CLERK
SYRACUSE

Opinion of the District Court (6/9/92).

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

JOSEPH E. MCDERMOTT, as President of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO; and RAND CONDELL, as President of Public Employees Federation, AFL-CIO,

Plaintiffs,

v.

MARIO CUOMO, as Governor of the State of New York; JOSEPH BRESS as Executive Director of the Governor's Office of Employee Relations; New York State Department of Audit and Control; EDWARD V. REGAN, as Comptroller of the State of New York; and STATE OF NEW YORK,

Defendants.

91-CV-0057

APPEARANCES:

RICHARD E. CASAGRANDE, Attorney for Public Employees Federation [PEF], 1168-70 Troy-Schenectady Road, P.O. Box 12414, Albany, New York 12414-2414

Of Counsel:

Nancy L. Burritt, Esq.

ROBERT ABRAMS, Attorney General of the State of New York, The Capitol, Albany, New York 12224

Robert A. Siegfried, Esq., Ass't Attorney General

FREDERICK J. SCULLIN, JR., J.

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

This case is another in a series of similar cases involving challenges to legislation enacted by the New York State Legislature that effected "lag payrolls" on New York State employees. *See, e.g., Association of Surrogates and Supreme Court Reporters Within the City of New York*, 940 F.2d 766 (2d Cir. 1991) *cert. denied* ____ U.S. ____, 112 S.Ct. 936, ____ L.Ed.2d ____ (1992) [hereinafter *Surrogates I*]; *Association of Surrogates and Supreme Court Reporters Within the City of New York*, 79 N.Y.2d 39, 588 N.E.2d 51, 580 N.Y.S.2d 153 (1992) [hereinafter *Surrogates II*], *Association of Surrogates and Supreme Court Reporters Within the City of New York*, 78 N.Y.2d 143, 577 N.E.2d 10, 573 N.Y.S.2d 19 (1991); *In re Quirk v. Regan*, 148 Misc.2d 300, 565 N.Y.S.2d 422 (Sup. Ct. Albany County 1991). The plaintiffs, Civil Service Employees Association [hereinafter "CSEA"] and Public Employees Federation [hereinafter "PEF"] commenced this lawsuit in January 1991 to challenge certain legislation (1990 N.Y. Laws, ch. 947, §12 (codified as N.Y. State Fin. Law § 200 (2-a (a)) (McKinney Supp. 1992) [hereinafter "Chapter 947]) alleging that it violates their rights under Article I, Section 10, Clause 1 of the United States Constitution (Contract Clause). There-

after, on or about April 15, 1992, CSEA and the State of New York [hereinafter "State"] entered into a stipulation pursuant to Fed. R. Civ. P. [hereinafter "FRCP"] 41, resulting in CSEA's voluntary withdrawal, without prejudice, of its claim against the State. PEF, therefore, is the only remaining plaintiff in this action.

Jurisdiction is based upon 28 U.S.C. §1331.

II. BACKGROUND

The following facts are uncontested:

PEF represents approximately 50,000 State Executive branch employees in the Professional, Scientific and Technical Services bargaining unit. PEF entered into a collective bargaining agreement with the State for the stated period of April 1, 1988 through March 31, 1991. The agreement contained a provision stating that salary payments would be computed on the basis of ten working days. The agreement also provided for a negotiated lag pay limited to two weeks.

In December 1990, the State Legislature enacted Chapter 947, which resulted in the withholding of one-tenth of each plaintiff-employee's pay over a ten-week period, from December 27, 1990 through March 31, 1991. Thus, the State paid the employees for nine days' salary instead of ten days' salary for five successive pay periods. The five days withheld are to be repaid to the employees upon their termination from State employment, at their then applicable rate of pay.

As stated, this suit was commenced in January 1991. PEF thereafter moved this court for summary judgment, pursuant to FRCP 56. PEF requests that the court declare Chapter 947 unconstitutional, on the grounds that it violates the Contract Clause, and the Due Process Clause of the Fourteenth

Amendment to the Constitution. PEF also asks the court to enjoin the defendants from continuing to withhold their pay, and to direct the defendants to return the withheld pay to the plaintiff-employees. The State cross-moves for summary judgment, claiming that Chapter 947 was "reasonable and necessary" in light of the unprecedented fiscal crisis facing New York in the 1990-91 fiscal year and, therefore, does not violate the Contract Clause.[1] Oral argument was heard by the court in Syracuse, New York on April 24, 1992. After considering all of the pleadings, memoranda of law and oral arguments, the court finds that there are no genuine material facts in dispute in the present case, and nothing to materially distinguish this case from the other lag payroll cases. In view of the clear precedent, the court grants PEF's motion for summary judgment and denies the cross-motion by the State of New York.

III. DISCUSSION

On this motion for summary judgment, PEF bears the burden of demonstrating that there are no genuine issues of material fact. The substantive law determines which facts are material. An issue is genuine "[I]f the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, ____ (1986).

A. Contract Clause

The Contract Clause states, in pertinent part: "[N]o state shall . . . pass any . . . Law impairing the Obligation of

[1]For further explanation, see Defendants' Memorandum of Law in Support of its Cross-Motion at 2.

Contracts . . . ." U.S. Const. art. I, § 10, cl. 1. Despite the seemingly absolute language in the Clause, finding an "impairment" of contract is merely a threshold step toward "resolving the more difficult question whether that impairment is permitted under the Constitution." *Surrogates I* at 771 (quoting *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 21, 97 S.Ct. 1505, 1517, 52 L.Ed.2d 92, ____ (1977)).

In cases involving private contracts, courts must first determine whether the legislation causes a "substantial" impairment, and then, if it does whether the legislation is a "reasonable" means to a "legitimate public purpose" 431 U.S. at 22-23, 97 S.Ct. at 1519, 52 L.Ed.2d at ____. As the *Surrogates I* court explained:

> Generally, legislation which impairs the obligations of *private* contracts is tested under the contract clause by reference to a rational-basis test; that is, whether the legislation is a "reasonable" means to a "legitimate public purpose."

Surrogates I at 771 (citing *United States Trust Co.*, 431 U.S. at 22-23, 97 S.Ct. at 1517-1518, 52 L.Ed.2d at ____) (emphasis in the original). Furthermore, in considering legislation involving social and/or economic measures, courts will properly defer to legislative judgment in determining whether it be "reasonable and necessary." *Id.* However, courts are less deferential to a state's judgment of reasonableness and necessity when a state's legislation is self-serving and impairs the obligations of *its own* contracts. *Id.* at 771.

The Second Circuit, in *Surrogates I*, and the New York Court of Appeals, in *Surrogates II*, determined that legislation similar to that in the present case was unconstitutional.

The plaintiffs in both *Surrogates* cases were employees of the State Unified Court System whose collectively bargained-for rights were affected by State legislative action.

In *Surrogates I*, the New York State Legislature enacted legislation set forth in 1990 N.Y. Laws, ch. 190, § 375 authorizing the State to pay the affected employees nine days' salary rather than ten days' salary in each pay period for ten successive two-week pay periods. 940 F.2d at 769. Thus, employees were paid for a total of fifty instead of fifty-two weeks for the fiscal year ending March 31, 1991; the two weeks' withheld pay was to be repaid to the employees upon the termination of employment with the State at their then applicable rate of pay. *Id.* at 769. This measure was expected to save the State approximately $7 million.

As in the present case, the *Surrogates I* employees were parties to collective bargaining agreements with the State which included the provision that "bi-weekly salaries will be computed on the basis of ten working days." *Id.* at 770.

The Second Circuit held that there was a contractual impairment and that it was substantial. *Id.* at 771-72. The circuit court reasoned that the indefinite withholding of an amount equalling ten percent of an employee's pay over a twenty-week period could prevent the employee from meeting financial obligations such as mortgages, loans, credit cards, and the like. *See id.* at 772.

In so holding, the court rejected the defendants' contention that the substantial impairment was "reasonable and necessary" for the achievement of the State's goals, since "[t]he state could have shifted the seven million dollars from another governmental program, or it could have raised taxes." *Id.* at 773. "The contract clause, if it is to mean anything, must prohibit New York from dishonoring its existing contractual obligations when other policy alternatives are available." *Id.* at 774. The court remarked in

dictum: "Were we to uphold this lag-payroll legislation, one wonders if the employees would ever receive their lagged wages, or whether another of the state's perennial 'fiscal crises' . . . would justify deferring again, or even cancelling, the lagged wages when they eventually become due." *Id.* at 774 (citation omitted).

The Second Circuit also rejected the State's challenge to its jurdisdiction on the basis that the lag payroll had been fully effectuated as of March 31, 1991, thereby making the claims for declaratory and injunctive relief moot, limiting the plaintiffs' remedy to "retroactive monetary relief," and thus barred by the Eleventh Amendment. *Id.*

The court reasoned that, although the money had already been withheld, "[T]he lag payroll continues, and will continue to impair the state's contractual obligations by deferring every salary check of each employee for a period of two weeks, until the employee leaves the service of the state . . . and will, therefore, be enjoined." *Id.* at 774. And, since the court found the enjoinment of the lag payroll to be a prospective remedy, it held that directing the state defendants to return the withheld monies was proper,

> [S]ince the eleventh amendment does not bar suits against state officers to enjoin violations of federal law, and any monies that will be restored to the plaintiffs from the state treasury are ancillary to the prospective relief which we order . . . .

Id.

Surrogates II involved the State's attempt, via legislative amendments to the State Finance Law (1991 N.Y. Laws, chs. 166, § 382 and 171, § 1 (codified as N.Y. State Fin. Law § 200 (2-b) (McKinney Supp. 1992))) to save an al-

leged $10.7 million and offset anticipated State budget shortfalls for the fiscal year 1991-92 by paying employees for nine rather than ten days in each bi-weekly salary check over five payroll periods. 79 N.Y.2d 39, 588 N.E.2d 51, 580 N.Y.S.2d 153. The New York Court of Appeals, applying the same rationale as the Second Circuit in *Surrogates I*, struck down this legislation. *Id.* The court held that the impairment of contract was substantial, as in *Surrogates I*, for essentially the same reasons:

> The burden [the lag payroll] imposes is essentially the same as in *Association of Surrogates I* (*supra*). It results in withholding 10% of an employee's expected wages each week over a period of 10 weeks: salary which will not be paid until the employee leaves State service, which may be years in the future. That is not an insubstantial impairment to one confronted with monthly debt payments and daily expenses for food and the other necessities of life.

Surrogates II at 46, 588 N.E.2d at 54, 580 N.Y.S.2d at 156.

In comparing the facts of the present case to those in the *Surrogates* cases, this court finds that precedent is clear and controlling and therefore, as a matter of law, finds that Chapter 947 effects a substantial impairment of contract.

Thus, the only issue remaining for the court to decide is whether Chapter 947's enactment was "reasonable and necessary to further an important public purpose." *See United States Trust Co.* at 25.

The State contends that the number of affected employees in this case, and the severity of the fiscal crisis at the time Chapter 947 was enacted, make this legislation more reasonable and necessary than the situations that existed in

Surrogates I or *II*. The State attempts to distinguish this case from the *Surrogates* cases in that Chapter 947's effect is more widespread—i.e., instead of withholding pay from a small group of employees, it effected lag payrolls on the entire Executive branch. Carried to its conclusion, this argument implies that, if a constitutional violation affects a large group of people, rather than a small group—such action would be "reasonable" to further an important public purpose. It would seem that such an argument would be more relevant, if at all, to an equal protection claim, rather than to a Contract Clause claim. We are unable to find in *Surrogates I* or *II* where the number of persons affected was dispositive on the issue of "reasonable and necessary." On the contrary, both decisions turned on whether "payroll lagging" itself was a legitimate method to accomplish an important, lawful public purpose.[2] And, as the *Surrogates II* court concluded:

> [N]or is lagging reasonable and necessary to accomplish the State's purposes. The choice of which revenue-raising or revenue-saving devices should be used is for others, not the courts, but the menu of alternatives does not include impairing contract rights to obtain forced loans to the State from its employees.

Surrogates II at 47, 588 N.E.2d at 54, 580 N.Y.S.2d at 156.

As in the *Surrogates* cases, the pivotal question here is whether the measure (lag payroll) was reasonable and necessary—where there are other alternatives available. Here too, this court finds nothing of any import to distinguish this case from the *Surrogates* cases. Although the precise alter-

[2]Without addressing this issue, we assume for purposes of this argument that the State action was for an important, lawful public purpose.

natives may vary—there are alternatives. For example, the State could have utilized deficit spending, eliminated other programs and/or temporary commissions, or reduced mandated programs.

The State's attempt to distinguish the present situation from the other cases on the basis of the severity of the crisis also fails. Although there is some dispute as to what extent the fiscal situation that existed at the time of Chapter 947's enactment was foreseeable, the crisis cannot be said to be so much more severe than that in the *Surrogates* cases so as to justify a different result. This court finds that the severity of crisis issue is not critical; that other alternatives were available to the State, and thus, the lag payroll measure was not "reasonable and necessary."

Finally, the State's attempt at characterizing the withholding in this case as a "lump sum separation" rather than a lag payroll does not persuade the court that the repayment of the money is barred by the Eleventh Amendment, or that the action is moot due to the withholding having been effectuated as of March 31, 1991. The facts remain that the money was withheld, continues to be withheld, and will remain withheld until the employees leave State employ. The money "rolls over" each pay period, year to year, until the time of the employee's termination. Therefore, the claims for declaratory judgment and injunctive relief are not moot. As in *Surrogates I*, the injunctive relief sought is a prospective remedy, and any monies returned to PEF employees would be ancillary to this prospective relief, and thus not barred by the Eleventh Amendment. *See id.*

Furthermore, for the same reasoning as in *Surrogates I*, plaintiffs are entitled to interest on the withheld money at a rate of seven percent (reflecting the rate currently paid by the United States Treasury Department on tax refunds). *See*

772 F. Supp. 1412, 1417-1418 (S.D.N.Y., 1991) (on remand from Second Circuit Court of Appeals). The interest is to be computed from March 31, 1991, the last date on which checks reflecting the withholding of lagged monies were received. *See id.*

B. Fourteenth Amendment Claim

Inasmuch as the court determines that PEF is entitled to summary judgment on the basis of its Contract Clause claim, the court declines to address the constitutional question of whether Chapter 947 also violates the Fourteenth Amendment.

C. Defendant's Cross-Motion

For the reasons stated above in favor of the PEF's motion for summary judgment, the State's cross-motion for summary judgment is denied.

CONCLUSION

Chapter 947 violates the Contract Clause of the U.S. Constitution. The defendants are hereby enjoined from continuing the effects and application of Chapter 947 and are directed to return the withheld monies, plus interest in the amount of seven percent calculated from March 31, 1991, to the plaintiffs within sixty days of this judgment.

Dated: June 9th, 1992
Syracuse, New York

FREDERICK J. SCULLIN, JR.
UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
JUN 11 1992
____ O'CLOCK ____ M
GEORGE A. RAY, CLERK
SYRACUSE

Order of the District Court Granting a Stay (7/30/92)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

JOSEPH E. MCDERMOTT, as President of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO; and RAND CONDELL, as President of Public Employees Federation, AFL-CIO,

Plaintiffs,

against

MARIO CUOMO, as Governor of the State of New York; JOSEPH BRESS, as Executive Director of the Governor's Office of Employee Relations; New York State Department of Audit and Control; EDWARD V. REGAN, as Comptroller of the State of New York,

Defendants.

Civil Action No. 91-CV-0057

(Scullin, J.)

APPEARANCES:

Richard E. Casagrande, Esq., Nancy Burritt, of counsel, attorney for the Plaintiffs, Public Employees Federation, 1168-70 Troy Schenectady Road, Albany, NY 12110, Albany, New York.

Robert Abrams, Attorney General of the State of New York, Bar Roll No. 102608, Attorney for Defendants, The Capitol, Albany, NY 12224.

Robert A. Siegfried, Assistant Attorney General, of Counsel.

HONORABLE FREDERICK J. SCULLIN, JR.
United States District Court

Defendants having moved for a stay of the judgment in this action pending appeal pursuant to Rule 62 of the Federal Rules of Civil Procedure, and plaintiffs having opposed the motion and after hearing the arguments of counsel and upon due consideration:

ORDERED, that the judgment with respect to the monetary relief filed in this action on June 18, 1992 is stayed pending defendants' appeal.

DATED: Syracuse, New York
July 30th, 1992

FREDERICK J. SCULLIN, JR.
United States District Court Judge

U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
JUL 30 1992
AT ____ O'CLOCK ____ m
GEORGE A. RAY, CLERK
SYRACUSE

Payroll Bulletin No. P-679. (1/2/91)

Office of the State Comptroller

PAYROLL BULLETIN

Subject: 1990-91 Salary Withholding and
Lump Sum Payment Program

Bulletin No.: P-679

Date: January 2, 1991

Chapter 947 of the Laws of 1990, the Deficit Reduction Legislation, provides for the withholding of salary for 5 days from all employees in 1990-91 and payment for this period at the time of separation from service.

The payment dates for payrolls will remain the same. In each of 5 consecutive payroll periods, beginning with Institution 20-Lag, 21-Current and Administration 21-Lag and 22-Current, payment will be for 9 defined days, as specified in the attached chart. At the end of the fifth payroll period, the payroll will revert to the previously established procedure, with payment on the regular previous schedule.

As a result of this procedure, one week will remain unpaid as defined below:

Institutions-Lag	- February 28-March 6, 1991
Institutions-Current	- March 14-March 20, 1991
Administration-Lag	- March 7-March 13, 1991
Administration-Current	- March 21-March 27, 1991

Employees will have salary due to them for time worked or charged to leave credits during this one week period.

The program applies to all Departments and agencies of the Executive Branch, including the State University of New York and the Senior Colleges of the City University of New York and, by election, to all employees of the Senate, the Assembly and all Joint Legislative Employers. The program does not apply to the Unified Court System or to authorities (15900, 21750, 28990, 55030).

The following groups of employees or types of payments are excluded from the withholding process:

a. all employees paid an hourly rate of less than $4.23 per hour.

b. all seasonal employees paid at an hourly rate.

c. all students at the colleges of the State University or City University of New York.

d. adjuncts and summer session payments in the colleges of the State University or City University of New York.

e. all extra service payments, either in an agency different from the employee's full-time employment or in the same agency.

You should continue to pay these employees all salary due for each pay period using the regular pay period dates.

IMPLEMENTATION OF THE WITHHOLDING FOR CURRENT EMPLOYEES

The salary withheld is regular salary only-basic annual salary plus all annual additional salary factors-location pay,

inconvenience, geographic differential, shift differential, premium overtime and occupational pay differentials. All other salary-such as pre-shift briefing, overtime, holiday pay, hazardous duty pay and CUNY Bonus-will not be withheld and is to be paid in full as earned.

The payment for nine-days for annual-salaried and bi-weekly salaried employees will be accomplished by changing the calculation of Normal Gross to a 9-day factor as described below. The Normal Gross for employees currently on the Workers' Compensation Supplemental System will also be changed automatically.

Pay Basis Pay	**9-Day Factor**
ANN, CAL, SAN, CYF	.034520
21P, CYP	.042857
10M	.041583
BIW	.90

For Part-time employees the calculation is annual salary (including annual salary factors) X 9-Day Factor X PT%.

The Normal Gross on your Payroll Register for Institution Period 19-Lag, 20-Current and Administration Period 20-Lag, 21-Current will be calculated using these factors. This is the amount that will be paid in the following period if no PR-75 is submitted.

Employees paid an hourly or daily rate who are subject to the withholding are to be paid for all hours or days worked during the nine days included in each payroll period.

Preparation of PR-75's

Salary and Status Changes

All salary and status changes are reported in the payroll period in which it occurs (using the new payroll period dates on the attached chart) and the Gross (Add) is calculated based on the full (10-day Normal) daily rate of salary owed for each of the nine days being paid in the period.

Miscellaneous Payments

All payments of overtime, holiday pay, pre-shift briefing pay, etc., should be paid in full in the usual manner. For transactions which use a daily rate, (e.g. holiday pay or lost time) you must use the biweekly computed at the 10-day factor. In computing the Gross (Add) for the period, use the 9-day Normal Gross from the previous payroll and add or subtract the amounts of the miscellaneous transactions.

Payroll Deductions

The reduction in salary may affect employees who receive a small net check. Many of these employees have large credit union deductions. These employees may wish to change their deduction, or to enroll in direct deposit instead, if they are eligible. We are, however, changing the order of cancellation of deductions to drop credit union deductions before any others.

Return to Normal 10-Day Payment

The Normal Gross Salary on the payroll for Institution 23-Lag, 25-Current and Administration 25-Lag, 26-Current will automatically revert to the 10-day factor. Use the 10-day Normal Gross for preparation of payrolls for Institution 25-Lag, 26-Current and Administration 26-Lag, 1-Current.

IMPLEMENTATION OF THE WITHHOLDING FOR NEW EMPLOYEES

Employees hired after Institution Period 20-L/21-C or Administration 21-L/22-C will also have one week's pay withheld. The employee will be paid for 9 days in each of the first five payroll periods.

These employees should be reported initially with the appropriate appointment code and the additional transaction code LAG BASIS. The Normal Gross will automatically be computed with the 9-Day Factor.

Group 1 Complete blocks #01 through 06 and the following:
Class B #07 Transaction Code—enter the appropriate appointment transaction code and complete the block requirements for that code
23 Gross (Add)
26 Time Paid
45 Addt'l Trans Code—enter LAG BASIS

In the sixth payroll period after appointment, the transaction code REM LAG must be reported. This will restore the Normal (Gross) calculation back to the 10-day factor.

Group 3 Complete blocks #1 through #06 and the following:

Class B #07 Transaction Code—enter REM LAG
12 Transaction
Effective Date—enter the first day of the period
23 Gross (Add)
24 Normal (Deduct)
26 Time Paid

DETERMINATION AND REPORTING OF DAYS DUE

Employees will receive payment for any days due for the one week period of withholding at the time of separation.

In order to prepare for this future payment agencies must determine the actual days, in full time equivalent days, due to each employee for the one-week period of salary withholding. Employees must have worked, or charged time to leave credits, in order to be entitled to payment. For example:

1. A full-time employee who worked all days during the period will be due 5 days pay.

2. A half-time employee who worked all days during the period will be due 2.5 days pay.

3. An employee on sick leave at half-pay for the period will be due 2.5 days pay.

4. A full-time employee who worked 3 days in the period and had 2 days lost time will be due 3 days pay.

5. An hourly employee who worked 40 hours during the period will be due 5 days pay.

6. An employee working 80% who was on vacation and charged leave credits for the entire period will be due 4 days pay.

Payroll Offices must be sure to accumulate and complete time reports for all employees for the week of salary withholding. OSC is developing procedures for reporting this information to us. You will receive further information on this process.

PAYMENT UPON SEPARATION FROM SERVICE

When an employee separates from service (resignation, termination, retirement, death, etc.), the employee will be paid for the days withheld at the salary (basic annual and annual salary factors) received at the time of separation. A new transaction code—SALARY LSP—has been established to report this payment.

Transaction Code: SALARY LSP

Group 3	Complete blocks #01 through #06 and the following:	
Class B	#07 Transaction Code	—enter SALARY LSP. If this block is filled use the first available Addt'l Trans Code block.
	23 Gross (Add)	
	24 Normal (Deduct)	—if applicable
	49 Misc Block A	—enter number of days due for the withholding period in full days for both full time and part-time employees.

50 Misc Block B —enter the amount of the payment based on 1/10th of the biweekly salary computed on basic annual and annual salary factors X number of days.

Questions concerning this bulletin should be directed to your Audit Supervisor.

SALARY DEFERRAL PROGRAM
9-DAY PAYROLL SCHEDULE

Lag Payrolls

Pay Period	Submission Date	Check Date	New Pay Period Dates	Regular Pay Period Dates
Institutions				
20-L	Jan 10	January 24	Dec 27-Jan 8	Dec 27-Jan 9
21-L	Jan 25	February 7	Jan 9-Jan 21	Jan 10-Jan 23
22-L	Feb 7	February 21	Jan 22-Feb 2	Jan 24-Feb 6
23-L	Feb 22	March 7	Feb 3-Feb 14	Feb 7-Feb 20
24-L	March 8	March 21	Feb 15-Feb 27	Feb 21-March 6
*25-L	March 21	April 4		March 7-March 20

*Return to Normal 10-day payment on a two-week lag.
February 28 to March 6, 1991 remains unpaid.

Administration				
21-L	Jan 18	January 30	Jan 3-Jan 15	Jan 3-Jan 16
22-L	Feb 1	February 13	Jan 16-Jan 28	Jan 17-Jan 30
23-L	Feb 14	February 27	Jan 29-Feb 9	Jan 31-Feb 13
24-L	March 1	March 13	Feb 10-Feb 21	Feb 14-Feb 27
25-L	March 15	March 27	Feb 22-March 6	Feb 28-March 13
*26-L	March 29	April 10		March 14-March 27

*Return to Normal 10-day payment on a two-week lag.
March 7 to March 13, 1991 remains unpaid.

SALARY DEFERRAL PROGRAM
9-DAY PAYROLL SCHEDULE

Current Payrolls

Pay Period	Submission Dates	Check Date	New Pay Period Dates	Regular Pay Period Dates
Institutions				
21-C	Jan 10	January 24	Jan 10-Jan 22	Jan 10-Jan 23
22-C	Jan 25	February 7	Jan 23-Feb 4	Jan 24-Feb 6
23-C	Feb 7	February 21	Feb 5-Feb 16	Feb 7-Feb 20
24-C	Feb 22	March 7	Feb 17-Feb 28	Feb 21-March 6
25-C	March 8	March 21	March 1-March 13	March 7-March 2
*26-C	March 21	April 4		March 21-April

*Return to Normal 10-day Payment on a two-week lag.
March 14 to March 20, 1991 remains unpaid.

Administration				
22-C	Jan 18	January 30	Jan 17-Jan 29	Jan 17-Jan 30
23-C	Feb 1	February 13	Jan 30-Feb 11	Jan 31-Feb 13
24-C	Feb 14	February 27	Feb 12-Feb 23	Feb 14-Feb 27
25-C	March 1	March 13	Feb 24-March 7	Feb 28-March 1
26-C	March 15	March 27	March 8-March 20	March 14-March 2
* 1-C	March 29	April 10		March 28-April 1

*Return to Normal 10-day Payment on a two-week lag.
March 21 to March 27, 1991 remains unpaid.